Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for	)	
Local Exchange Carriers	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 07-135
	)	
Developing an Unified Intercarrier	)	WC Docket No. 05-337
Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link-Up	)	WC Docket No. 03-109

FeatureGroup IP Early Filed Reply Comments on USF/ICC NPRM Part XV Addressing Texas PUC Application of Current Law to LEC to LEC Intercarrier Interconnection and Compensation Regarding VoIP Issues

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April 11, 2010

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NOW COMES UTEX Communications Corp. b/d/b FeatureGroup IP ("FeatureGroup IP") and submits these early filed reply comments in response to the Notice of Proposed Rulemaking.

UTEX attempted PURPOSE OF EARLY FILED COMMENTS

FeatureGroup IP has reviewed the initial comments. At least three of the comments refer to and/or quote from the recent Texas PUC Award in the UTEX/AT&T current arbitration proceeding.[1] Further, in the April 6, 2011 FCC ICC workshop, many of the concepts that were

[1] Texas PUC Docket 26381, *Petition of UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Southwestern Bell Telephone Company*, Award and Contract Matrix (January 27, 2011), available at http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=26381&TXT_ITEM_NO=258. The Commission refused to preempt the Texas PUC under § 252(e)(5) despite a multi-year abatement of the case by the Texas PUC, and exhorted the Texas PUC to finish the arbitration by applying "current law." Memorandum Opinion and Order, *In the Matter of Petition of UTEX Communications* Corporation*, Pursuant to Section 252(e)(4) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, 24 FCC Rcd 12573 (2009); Renewed Petition denied Memorandum Opinion and Order, *In the Matter of UTEX Communications*

discussed were directly arbitrated between FeatureGroup IP and AT&T, and are the subject of "appropriate conditions" prescribed by the Texas PUC in Docket 26381. The parties submitted conforming contract language on March 24, 2011."[2]

The Texas PUC addressed and prescribed terms relating to *inter alia*: (1) how to functionally segregate traffic that has an IP end-point from PSTN-PSTN traffic; (2) what is "phantom" traffic; (3) when signaling of a geographic number populated in the LERG is and is not required; (4) the volumes justifying an ILEC's request to directly interconnect with a CMRS Carrier and/or CLEC that uses FeatureGroup IP as the Transit Provider; (5) how jointly provided access will work when a PSTN-originated telephone toll call is made to a patron of one of FeatureGroup IP 's ESP customers; (6) can an ILEC refuse to route telephone exchange and/or exchange access traffic unless and until FeatureGroup IP pays access-based nonrecurring and recurring charges"; and, (7) the appropriate processes and requirements to ensure compliance.

Corporation Petition for Preemption, WC Docket 09-134, DA 10-1920, 25 FCC Rcd 14168, (2010), Motion for Reconsideration Pending.

[2] FeatureGroup IP refers to the "Current Award" as the product of the actual "Arbitration" conducted by the Staff Arbitration team. The Current Award is comprised of hundreds of pages in the form of an Arbitration Narrative and Attached "Matrices" containing specific awarded contract language. The parties were also provided guidance and direction on the remaining terms that were to be submitted. The entire result was expressly found to be consistent with "Current Law" – in other words, none was the product of voluntary terms under § 252(a) that were not required to be consistent with the Act and FCC rules. Both FeatureGroup IP and AT&T have asserted that certain portions and prescriptions are not consistent with some element of current law. However, the parties have filed a mostly "joint contract" that for the most part represents agreement on Award implementation. One critical place where AT&T refused to include specifically Awarded Contract language relates to the factual finding that when UTEX provides services to its new technology VoIP customers via SIP, UTEX is providing ***telephone exchange service*** and thus § 251(b)(5) reciprocal compensation and § 251(c)(2) interconnection obligations apply – at least under certain specified circumstances spelled out in the Award. This ruling is related to "phantom traffic" issues in that when FeatureGroup IP uses a non-geographic number such as a 5yy number assigned by NANPA to identify the traffic as IP Originating, and the traffic otherwise meets the "ESP/VoIP" requirements required by the Award, the traffic is not subject to § 251(g) and is governed by 251(b)(5). Thus, Texas has recognized that traffic that may not have a geographic identifier can sometimes be not "Phantom" and not "Access." More important to FeatureGroup IP is that AT&T is required, under current law, to stop blocking the use of these numbers and they are required to load and route calls dialed to FeatureGroup IP's non-geographic numbers, thus removing the ability of AT&T to create "one way" traffic flows and other limitations for new technology traffic to and from the Internet. As we commented in our April 1st filing, this is critical to prevent anti competitive defensive leveraging against FeatureGroup IP's attempts to establish "the Internet's Area Code" for new and evolving voice applications embedded with IM based technologies.

FeatureGroup IP concurs with the apparent consensus that the Commission can and should look at what the Texas PUC Arbitration Team has done to move the ball forward on resolving VoIP intercarrier and interconnection issues. At the same time, FeatureGroup IP is extremely concerned that the "discussions" about FeatureGroup IP and our efforts to create legal certainty under current law about a CLEC's interconnection rights and duties in Texas are neither complete nor accurate. Thus, FeatureGroup IP is making this filing to provide our understanding of what the Texas PUC has ruled so far.[3] We are also providing some model contract terms in Word that are based largely on the Award and FeatureGroup IP's understanding of the intent of the Texas PUC's current rulings.[4] FeatureGroup IP notes that it does not agree that all of the rulings in the Award are consistent with current law. However, FeatureGroup IP nonetheless encourages other parties and especially the FCC to consider this "example" contract as a current resolution of the seminal issues before the Commission.

ISSUES DECIDED BY TEXAS ARBITRATION TEAM UNDER CURRENT FEDERAL LAW

As noted, the Commission instructed the Texas PUC to end a several year "abatement" and complete the arbitration applying current law with regard to how VoIP will be classified, signaled, routed and rated as between two LECs. The broad question is whether **a wholesale service offered by FeatureGroup IP that involves communication between FeatureGroup IP and its ESP customers over the Internet is "telephone exchange service" subject to § 251(b)(5) or is instead subject to "Exchange Access."**

[3] The final contract has not been approved by the Texas PUC under § 252(e). Under the Texas Procedural Rules, the work of the Arbitration Team is now subject to a review by the three appointed Commissioners. Thus, it is at least possible that the Arbitrators' application of the "Rule of Law" in the Award may be changed by political appointees more subject to political pressure brought by AT&T.

[4] These are not the full and complete terms as filed in Texas PUC Docket 26381. For example, language not relevant to VoIP traffic exchange has been omitted and internal references were changed accordingly.

The Arbitration Team's decision on the issue appears in the Executive Summary beginning on Award page 13 and then in a more detailed discussion starting on page 36. Prescribed contract language appears on page 50. The Arbitrators' discussion and language prescriptions are italicized. Original footnote text is maintained, but the numbering has changed.

Intercarrier Compensation for Traffic Involving UTEX's ESP Customers

DPL Issues: UTEX 2 through 21, 30, 34, and 35 through 46; AT&T NIM-6, NIM 6-8(b), 6-10, 6-11, and 6-15

Executive Summary

The primary intercarrier compensation issue in this docket is whether AT&T Texas may assess access charges upon UTEX for communications involving UTEX's ESP customers. UTEX argues that under the FCC's ESP exemption, the service UTEX provides to its ESP customers is telephone exchange service and is, therefore, not subject to access charges. Alternatively, UTEX asserts that the service it provides to its ESP customers is exchange access, which UTEX jointly provides with AT&T Texas. In any event, UTEX asserts that it does not provide interexchange service and is, therefore, not subject to access charges. AT&T Texas argues that the ESP exemption applies to UTEX's ESP customers but not to UTEX. AT&T Texas asserts, therefore, that the traffic UTEX exchanges with AT&T Texas is subject to standard intercarrier compensation rules, including the access charge rules. AT&T Texas concludes that, to the extent that UTEX provides interexchange telecommunications service, UTEX is required to pay access charges.

The FCC has exempted ESPs from paying access charges in certain circumstances. This ESP exemption allows ESPs to purchase local business lines and, where applicable, pay special access surcharges instead of paying access charges. As discussed in more detail below, the Arbitrators conclude that AT&T Texas may not assess access charges upon UTEX for enhanced communications to or from a UTEX ESP customer that has a point of presence (POP)[5] in the same local calling area as the calling or called end user served by AT&T Texas.[6] When UTEX's customer has a POP in the same local calling area as the calling or called end user served by AT&T Texas, it is plain that UTEX is not providing interexchange service and is, therefore, not subject to access charges. Under the ESP exemption, this conclusion is not altered even if UTEX's ESP customer transports the traffic between the local calling area of the calling or called

[5] *Unless otherwise noted, this Award uses the term "POP" to refer to a physical point where an entity connects its network with the network of either Party.*

[6] *With respect to traffic that originates and terminates to end users in the same local calling area, as the term "end user" is defined in the End User Definition section of the Award, the Arbitrators note that such traffic qualifies as Local Traffic under the ICA language approved in connection with DPL Issue AT&T NIM 6-1 even if such traffic is routed through the POP of a UTEX ESP customer located outside the local calling area of the AT&T Texas calling or called end user.*

end user served by AT&T Texas and another exchange. The Arbitrators set forth the requirements for this type of traffic, referred to herein as ESP Traffic, in the Requirements for ESP Traffic section of the Award.

The Arbitrators also conclude that interexchange traffic exchanged between the parties that does not qualify as ESP Traffic should be compensated using the ICA's provisions for interexchange traffic, Optional EAS traffic, or FX traffic, as applicable. The Arbitrators discuss the application of these provisions in the Intercarrier Compensation for Interexchange Traffic That Does Not Qualify as ESP Traffic section of the Award.

Arbitrators' Decision (p. 36)

ESP Traffic Is Not Subject to Access Charges

Existing law provides a limited exemption from access charges for certain communications involving an ESP. Applying this exemption to the ICA at issue here, the Arbitrators conclude that AT&T Texas may not assess access charges upon UTEX when (1) UTEX provides service to a customer that meets the FCC's definition of an ESP, (2) the ESP customer elects to be treated as an ESP, (3) the ESP has a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located, (4) the traffic is routed through that POP, and (5) the ESP provides an enhanced service for the traffic. (Note: This Arbitration Award typically refers to ESPs as customers of UTEX rather than as customers of AT&T Texas because AT&T Texas has not expressed an interest in providing service to ESP customers. The intercarrier compensation provisions of this ICA do apply reciprocally, however.) The parties shall instead compensate one another for a communication meeting these requirements pursuant to the compensation provisions for Local Traffic.

FCC rules govern the assessment of interstate access charges.[7] FCC Rule 69.5(b) states that "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[8] Pursuant to this provision, an IXC that uses the local exchange switching facilities of a LEC for the provision of interstate telecommunications service must pay the LEC access charges for use of those local facilities.

Shortly after establishing the access charge regime, the FCC created a limited access charge exemption for ESPs.[9] In explaining the basis for this exemption, the FCC stated:

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[7] *See generally 47 C.F.R. §§ 69.1-69.731.*

[8] *47 C.F.R. § 69.5(b). While the FCC's rules use the term "carrier's carrier charges," the industry typically uses the term "access charges."*

[9] *In the Matter of MTS and WATS Market Structure, CC 78-72, Memorandum Opinion and Order ¶ 83, 1983 WL 183026 (rel. Aug. 22, 1983). The ESP exemption is optional and an ESP may elect to pay access charges instead of purchasing a local business line if it so chooses. In the Matter of Intercarrier Compensation for ISP-Bound Traffic, CC 99-68, Order on Remand and Report and Order ¶ 27, 16 FCC Rcd. 9151 (rel. Apr. 27, 2001) ("[T]he ESP exemption . . . affords one class of entities using interstate access – information service providers – the option of*

> *Other users who employ exchange service for jurisdictionally interstate communications, including . . . enhanced service providers, . . . who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. One of our paramount concerns in fashioning a transition plan is the customer impact or market displacement that any proposed remedy might cause. Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.*[10]

To implement the ESP exemption, the FCC: (1) excluded ESPs from regulation as carriers under Title II of the FTA, (2) defined ESPs and all other non-carriers as "end users" for purposes of its access charge rules, and (3) exempted end users from paying access charges.[11] *FCC Rule 64.702(a) states:*

> *[T]he term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.*[12]

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purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXCs.") (emphasis in original).

[10] *In the Matter of MTS and WATS Market Structure, CC 78-72, Memorandum Opinion and Order ¶ 83, 1983 WL 183026 (rel. Aug. 22, 1983).*

[11] *See In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC 87-215, Order ¶ 20 at n. 53, 3 FCC Record 2631 (rel. Apr. 27, 1988) ("At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users."); In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC 99-69, Declaratory Ruling ¶ 9, 14 FCC Record 3689 (rel. Feb. 26, 1999) ("As explained above, under the ESP exemption, LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover, the Commission has directed states to treat ISP traffic as if it were local, by permitting ISPs to purchase their PSTN links through local business tariffs.").*

[12] *47 C.F.R. 64.702(a) (emphasis added). The telecommunications industry uses three similar terms to refer to three different but related types of providers. As noted, the FCC's rules use the term "enhanced service provider" (ESP). The FTA uses the term "information service provider" (ISP), which has a meaning similar to the FCC's term ESP. The FCC also sometimes uses the acronym ISP in its orders to mean "Internet service provider." Internet service providers qualify as both enhanced service providers and information service providers. In this Award, the acronym ISP means Internet service provider.*

For purposes of assessing access charges, FCC Rule 69.2(m) defines the term "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier."[13] *Finally, FCC Rule 69.5(a) states that "[e]nd user charges shall be computed and assessed upon public end users."*[14] *Under the FCC's rules, therefore, a LEC may not assess access charges upon an ESP even if the ESP transports a communication outside the local calling area.*[15]*"*

For the reasons explained above, the following language should be included in the ICA:

Attachment 6 to NIM: Intercarrier Compensation

- *ESP Traffic exchanged between the Parties shall be compensated pursuant to the election made by the CLEC pursuant to Section 1.5 of this Attachment.*[16]

GTC Definitions

- *"Enhanced Service Provider" or "ESP" is a provider of enhanced services as those services are defined in 47 C.F.R. Section 64.702.*
- *"ESP Traffic" is telecommunications traffic for which (1) one party to this Agreement provides service to an ESP, (2) the ESP elects to be treated as an ESP rather than as an IXC, (3) the ESP has a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located, (4) the traffic is routed through that POP, and (5) the ESP provides an enhanced service for the traffic.*
- *"Point of Presence" or "POP" is a physical point where an entity connects its network with the network of either Party.*

The "existing law" answer by the Texas PUC Arbitration Team is a ***qualified yes***: VoIP and ESP traffic is governed under § 251(b)(5) when such traffic meets the Texas Arbitrators' "Dual POP Test." The "Dual POP" test requires that FeatureGroup IP/UTEX and its customer

[13] *47 C.F.R. § 69.2(m).*

[14] *47 C.F.R. §§ 69.5(a).*

[15] *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling, Memorandum Opinion and Order ¶ 20, 2 FCC Record 5986 (rel. Oct. 5, 1987), vacated as moot by Memorandum Opinion and Order, 7 FCC Rcd. 5644 (rel. Sept. 4, 1992) ("[U]nder this Commission's rules, enhanced service providers are classified as 'end users.' An end user that interconnected local exchange lines with interstate transmission facilities through a PBX or similar device on its premises would not be required to pay interstate access charges for the interstate traffic that traversed these local exchange lines. Rather, this would be treated as part of the 'leaky PBX' phenomenon, and the end user would pay subscriber line charges for its local exchange lines and special access surcharges on its private line connection.").*

[16] *Like the compensation provisions in the Docket No. 28821 CLEC Coalition ICA, Section 1.5 of Attachment 6 to NIM gives UTEX three compensation options for Local Traffic and ISP-Bound Traffic. See the Arbitrators' decision for DPL Issue AT&T NIM 6-4.*

who claims the ESP exemption each have a POP in the same local calling area as the PSTN end user.[17]

A related issue posed by UTEX was not answered in the Award. UTEX had asked for a finding that UTEX did not exist at the time of the Act and neither did its LEC services. The purpose was to obtain a legal decision flowing from the correct factually finding: since UTEX and its services did not exist at the time of the Act, then under *Worldcom*[18] the associated traffic must be exclusively exchanged within the realm of § 251(b)(5) and cannot be subjected to § 251(g) treatment. This would mean that the "ESP exemption" is not a necessary precondition to application of § 251(b)(5); the "ESP" issue is a second and independent basis for coverage within § 251(b)(5). The Arbitrators found it was not necessary to resolve the UTEX specific issue in order to resolve all of the signaling, rating and routing issues and yield a conforming contract. (See Award Matrix B - UTEX Issue 40). Thus under existing federal law, according to the Texas PUC, the ESP Exemption applies to all LECs not just ILECs like AT&T, and is established by the ESP, not by a LEC tariff or LEC business practice. However, according to the Texas PUC the exemption is limited to the same geographic calling scopes of the Incumbent LECs.[19]

[17] The Award clarifies that if the ESPs' patron is physically located in the same local calling area as the PSTN user the call would also be "local" and subject to § 251(b)(5) regardless of the location of the "POPs." Award p. 41, Award original footnote 198 (renumbered to 7 in these comments).

[18] *Worldcom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[19] Both AT&T and FeatureGroup IP believe the Texas PUC has made legal error. AT&T believes that under law only AT&T ILECs can serve so called ESPs, there must be an ILEC "business line," and if a CLEC is providing the service then access applies. In AT&T's world the CLEC becomes an IXC customer of the ILEC when it services an Internet Voice Application. FeatureGroup IP believes that under existing federal law there is no geographic "local POP" limitation and all of its services are subject exclusively to § 251(b)(5) when one end-point is not on the PSTN. In essence the TPUC rejected both arguments and found a surrogate PSTN end point, and end user status for the traffic at issue so that § 251(b)(5) applies sometimes and § 251(g) can apply in some circumstances.

It is this ruling that was partially cited by multiple parties in the initial April 1st round of comments. However, as UTEX explains below, this primary categorization issue for ESP Traffic leads to multiple domino issues also being resolved as well. Many of the more specific domino issues parallel the discussions in the April 6 workshop. The April 8th Magic Jack/AT&T Long Distance (IXC) complaint[20] issues are also resolved in the Award.

Because "how does current federal law resolve the intercarrier rights and duties" on a particular issue have now been answered, and there now exists a conforming draft contract implementing these specific decisions, FeatureGroup IP it doing its part of promoting judicial economy by depositing a more complete set of information in the record "early" so that it can be commented on by all interested parties.

Sub Issue 1) How is "ESP traffic" to be handled between the parties and what audit rights should exist to ensure there is no abuse?

The Texas Arbitration Team provided terms allowing each side to audit to ensure there is no abuse. One purpose is to prevent "misrouted traffic" which, as the NPRM pointed out, is *IP-in-the-Middle Traffic.* In order for there to be *IP-in-the-Middle Traffic* there must be two PSTN end points.

> ***Arbitrators' Decision***
>
> ***Establishment of Separate Trunk Group and Allocation of Burden of Proof***
> *The Arbitrators acknowledge that a party to this ICA may have difficulty determining whether traffic delivered to it by the other party qualifies as ESP Traffic, because the party delivering the traffic possesses information about its customers not available to the party receiving the traffic. The Arbitrators also note that the Commission determined in*

[20] Memorandum Opinion and Order, *AT&T Corp v. YMax Communications Corp.*, File No. EB-10-MD-005, FCC 11-59 (April 8, 2011). For example, unlike the Magic Jack complaint, AT&T Long Distance cannot assert that functionally UTEX's customers are not "end users" in order to avoid paying access charges when AT&T Long Distance terminates a call destined to a NPA-NXX which terminates to the ESP POP.

Docket No. 33323 that UTEX delivered misrouted traffic to AT&T Texas.[21] *For these reasons, the Arbitrators find that the ICA shall include language:*
(1) requiring the establishment of an appropriate number of separate trunk groups exclusively for the transport of ESP Traffic;

(2) establishing audit procedures that allow a party to verify that traffic passed on those trunk groups actually qualifies as ESP Traffic; and

(3) providing that, in a post-interconnection dispute involving the characterization of traffic as ESP Traffic, a party asserting that it has delivered ESP Traffic to the other party bears the burden of proving that such traffic in fact qualifies for the ESP Traffic provisions of the ICA.

Consistent with these findings, the Arbitrators conclude that the following ICA language shall be included in the ICA:

Attachment NIM 6-7

1.0 Trunking

1.1 AT&T Texas and UTEX shall establish one or more separate trunk groups for traffic routed from UTEX to AT&T Texas that UTEX classifies as ESP Traffic (ESP Traffic Trunk).

1.2 UTEX shall not pass traffic over an ESP Traffic Trunk unless the traffic qualifies as ESP Traffic.

2.0 Audits

2.1 AT&T Texas may initiate an audit to determine whether the traffic classified by UTEX as ESP Traffic actually qualifies as ESP Traffic under the terms of this Agreement (ESP Traffic Audit).

2.2 An ESP Traffic Audit shall be conducted by an independent, third party entity (Auditor).

2.3 AT&T Texas may initiate no more than one ESP Traffic Audit per year.

2.4 Each party shall bear its own costs for an ESP Traffic Audit. If, however, an ESP Traffic Audit determines that more than 10% of the traffic classified by UTEX as ESP Traffic does not qualify as ESP Traffic, then UTEX shall reimburse AT&T Texas's reasonable costs for that ESP Traffic Audit.

2.5 If UTEX fails to establish that an ESP Customer qualifies as a provider of enhanced services as defined by FCC Rule 64.702(a), then traffic routed to or from that customer shall not be considered ESP Traffic.

2.6 If UTEX fails to establish that traffic passed over an ESP Traffic Trunk qualifies as ESP Traffic, then that traffic shall not be considered ESP Traffic.

[21] *Docket No. 33323, Arbitration Award at 48 ("The Arbitrator concludes that IXCs have routed toll traffic through UTEX's interconnection facilities to avoid switched access charges. . . . UTEX acknowledged that a UTEX customer improperly routed VarTec's traffic through UTEX's network.").*

2.7 UTEX shall provide the Auditor with:

a. the physical address, where available, and V&H coordinates for each ESP customer's POP through which ESP Traffic is routed;

b. reasonable access to UTEX's premises;

c. information establishing whether a physical connection exists between UTEX and an ESP customer's POP;

d. information regarding the services provided by a UTEX ESP customer; and

e. any other information reasonably requested by the Auditor to determine whether the traffic qualifies as ESP Traffic.

2.8 If an ESP Traffic Audit determines that traffic classified by UTEX as ESP Traffic does not qualify as ESP Traffic, then UTEX must compensate AT&T Texas for that traffic according to the ICA's compensation provisions for the applicable traffic type.

2.8.1 UTEX shall also pay AT&T Texas interest on the difference between the amount originally paid by UTEX and the amount due according to the ICA's compensation provisions for the applicable traffic type. The interest shall be accrue from the original bill due date until the appropriate amount is paid. The interest rate shall be the lesser of (i) the rate used to compute the late payment charge in the AT&T Texas intrastate access services tariff and (ii) the highest rate of interest that may be charged under Applicable Law.[22]

2.9 The parties and the Auditor shall ensure that confidential information is protected consistent with applicable law. (Pages 47-50)

SUB-ISSUE 2) Can an ILEC like AT&T block any traffic from or to an ESP/VoIP provider? Specifically can an ILEC refuse to load and route NPA-NXXs unless the interconnecting CLEC agrees to first pay Access NRCs for loading the numbers and then Switched Access usage charges? Is the VoIP/ESP provided service ever subject to exchange access? If so, is it jointly provided access as between the two LECs?

Arbitrators' Decision

The Arbitrators conclude that AT&T Texas should not be permitted to block routing of calls to UTEX. FTA § 251(c)(2)(A) requires an ILEC to interconnect its facilities with those of any requesting telecommunications carrier "for the transmission

[22] *The Arbitrators have adopted the interest rate provision applicable to past due charges. See Joint Ex. 3 at 118 (General Terms and Conditions § 12.1.1).*

and routing of telephone exchange service and exchange access."[23] *AT&T Texas did not assert that it should be allowed to block routing of calls to UTEX but did state that UTEX's proposed language in Attachment NIM § 1.8 could cause AT&T Texas to breach the ICA through no fault of its own in cases in which UTEX's trunk capacity is exceeded. The Arbitrators agree with AT&T Texas on this point and, therefore, modify UTEX's proposed ICA language as shown:*

1.8 AT&T Texas agrees not to block or deny the passage of any traffic. Situations in which calls cannot be routed by AT&T Texas due to lack of capacity on UTEX trunks do not constitute blocking of calls by AT&T Texas.

In addition to their dispute regarding Attachment NIM § 1.8, the parties also disagree regarding whether AT&T Texas must route calls to UTEX's 500 numbers if UTEX does not purchase ACIS service from AT&T Texas's access tariff. The Arbitrators conclude that UTEX must compensate AT&T Texas at the tariffed rate for communications subject to the ACIS provisions of AT&T Texas's tariff, as described in more detail below.

UTEX states that it intends to serve ESP customers with its 500 number service. As discussed in the "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers" section of the Award, the Arbitrators do not agree with UTEX that every communication involving a UTEX ESP customer qualifies as telephone exchange service. Consistent with the Arbitrators' decisions in the "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers" section of the Award, a call from an AT&T Texas end user to a UTEX 500 number qualifies as telephone exchange service when (1) the call is routed to a called end user located in the same local calling area as the AT&T Texas end user or (2) the call is routed through the POP of UTEX's ESP customer located in the same local calling area as the AT&T Texas end user and meets the other requirements for ESP Traffic set forth above.

On the other hand, if UTEX's ESP customer is located outside the local calling area of the AT&T Texas end user and the call is routed to an end user outside that local calling area, then UTEX may be an IXC as discussed in more detail in the "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers" section of the Award and would, therefore, be subject to the access charges for ACIS service set forth in AT&T Texas' tariff. Furthermore, to the extent AT&T Texas and UTEX jointly provide access service to a third-party IXC that subscribes to UTEX's 500 number service, that IXC will be subject to the originating access rates as set forth in each party's interstate or intrastate access service tariffs.

AT&T Texas stated in its exceptions that the Commission does not have the authority to determine the compensation for AT&T Texas' ACIS service because that service is a federally tariffed access service.[24] *The Arbitrators have not altered the compensation for AT&T Texas' ACIS service, however. Instead, the Arbitrators have merely indicated the circumstances in which that tariff applies. As stated above, if a*

[23] *47 U.S.C. § 251(c)(2)(A).*

[24] *AT&T Texas Exceptions at 25.*

communications qualifies as exchange access subject to AT&T Texas' tariff, then the tariffed rate applies. But in cases where a call to a 500 number qualifies as telephone exchange service, then the FTA and FCC rules require reciprocal compensation.[25]

The Arbitrators further conclude that a 500 number does not qualify as a CPN for purposes of rating a call because a 500 number is non-geographic and, therefore, cannot be used to determine the location of the calling end user.

Consistent with these decisions, the Arbitrators conclude that the following language shall be included in the ICA:

1.0 A call placed by an AT&T Texas end user to a 500 number assigned to UTEX shall be compensated according to the ESP Traffic provisions of this Agreement if the call qualifies as ESP Traffic.

1.1 A call placed by an AT&T Texas end user to a 500 number assigned to UTEX shall be compensated according to AT&T Texas's access tariff if the call is an interexchange call that does not qualify as ESP Traffic, FX traffic, or Optional EAS traffic.

1.2 A call placed by an AT&T Texas end user to a 500 number assigned to UTEX that does not fall within section 1.0 or 1.1 shall be compensated as Local Traffic, FX traffic, Optional EAS traffic, or Transit Traffic, as applicable.

1.3 Jointly provided access service to a third-party IXC that subscribes to UTEX's 500 number service shall be compensated in accordance with Attachment 6 to NIM: Intercarrier Compensation §§ 6.0 – 6.7.(Award Page 67-69)

Under the Award AT&T may not block calls or apply its access tariff to UTEX unless UTEX operates its service offerings in a way that does not meet the "dual POP test" described above.

Sub Issue 3: Is there ever a circumstance where one of the LECs is providing Telephone Toll for VoIP traffic? Put another way, can one LEC deem the other an IXC and subject to an Access Tariff?

The TPUC Arbitration Team's answer from pages 50-59 of the Award:

Intercarrier Compensation for Interexchange Traffic That Does Not Qualify as ESP Traffic

The Arbitrators concluded above that UTEX does not provide telephone exchange service when it serves an ESP customer whose POP is located outside the local calling

[25] *47 U.S.C. § 251(d)(2); 47 C.F.R. §§ 51.503, 51.505.*

area of the calling or called end user served by AT&T Texas.[26] *UTEX asserts that the service it provides should be characterized as exchange access if it is not characterized as telephone exchange service.*[27] *UTEX expressly denies that it is an IXC or provides interexchange service.*[28] *Consequently, UTEX claims that AT&T Texas may not bill UTEX for access charges but must instead bill UTEX's ESP customer pursuant to the MECAB guidelines for jointly provided access.*[29] *AT&T Texas, on the other hand, states that "[w]hen UTEX delivers interexchange voice telephone calls for termination to AT&T Texas, UTEX is acting as an interexchange carrier providing interstate telecommunications. Under 47 C.F.R. § 69.5(b), UTEX is subject to access charges, as a matter of law."*[30]

The FCC has recognized on a number of occasions that existing law does not expressly address the intercarrier compensation that applies in cases such as this one.[31] *Nevertheless, in denying UTEX's first petition for preemption, the FCC stated that this Commission should arbitrate the ICA between UTEX and AT&T Texas "relying on existing law."*[32] *In this section, the Arbitrators provide guidance to the parties regarding the application of existing law to interexchange communications that do not qualify as ESP Traffic, Optional EAS traffic, or FX traffic.*

Interstate and Intrastate Access Charge Rules

The FCC sets the rules for assessment of access charges on interstate communications. FCC Rule 69.5(b) states that access charges apply to "all interexchange carriers that use local switching facilities for the provision of interstate

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[26] *While the Arbitrators also concluded above that a communication does not qualify as ESP Traffic if UTEX routes the communication to or from its ESP customer using optional EAS or FX service, the Arbitrators noted that if the traffic does not qualify as ESP Traffic, then Optional EAS traffic and FX traffic exchanged between the parties, where an end user of either party has subscribed to one of those services, will be subject to the compensation provisions for Optional EAS traffic and FX traffic, respectively, even if such traffic is routed through UTEX's ESP customer.*

In addition, while this section addresses compensation involving UTEX's ESP customers, the interexchange provisions of the ICA also apply when UTEX serves a traditional IXC customer.

[27] *UTEX Ex. 1, Feldman Direct, at 249:18.*

[28] *UTEX Initial Br. at 9-10.*

[29] *UTEX Ex. 1, Feldman Direct, at 250:4-251:10; UTEX Initial Br. at 58.*

[30] *AT&T Texas Reply Br. at 10.*

[31] *See, e.g., In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC 06-55, DA 07-709, Memorandum Opinion and Order ¶ 17, 22 F.C.C. Record 3513 (rel. Mar. 1, 2007) ("Certain commenters ask us to reach other issues, including the application of section 251(b)(5) and the classification of VoIP services. We do not find it appropriate or necessary to resolve the complex issues surrounding the interpretation of Title II more generally").*

[32] *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, WC 09-134, Memorandum Opinion and Order ¶ 10, 24 FCC Rcd. 12573 (rel. Oct. 9, 2009).*

and foreign telecommunications services."[33] *The FCC's access charge rules define "interexchange" as "services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as 'access service' for purposes of this part."*[34] *These rules define "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunications."*[35] *Taken together, these rules impose access charges on carriers that offer services other than origination and termination services that are an integral part of interstate or foreign telecommunications.*

This Commission sets the rules for assessment of access charges on intrastate communications. P.U.C. SUBST. R. 26.5(107) defines an IXC as "[a] carrier providing any means of transporting intrastate telecommunications messages between local exchanges, but not solely within local exchanges, in the State of Texas." The Commission has clarified that service between exchanges in a mandatory EAS area or extended local calling service (ELCS) area does not qualify as interexchange service subject to access charges.[36]

As explained in connection with DPL Issue AT&T NIM 6-5, the Arbitrators have directed the parties to use CPN to determine the originating and terminating points of a communication for intercarrier compensation purposes. Therefore, the FCC's rules for imposition of interstate access charges apply to communications where the calling and called party numbers are assigned to exchanges in different states. And this Commission's rules for imposition of intrastate access charges apply to communications where the calling and called party numbers are assigned to exchanges in different local calling areas within Texas.

Application of Access Charge Rules

The mere fact that UTEX does not want to be an IXC or that the IGI-POP provisions of UTEX's tariff do not purport to offer interexchange service is not controlling for purposes of assessing access charges. If UTEX meets the definition of an IXC for a given communication, then AT&T Texas may assess access charges upon UTEX for that communication consistent with the interexchange provisions of the ICA. The FCC explicitly recognized in the IP-in-the-Middle Order that a CLEC may assume the role of an IXC: "Depending on the nature of the traffic, carriers such as . . . competitive LECs may qualify as interexchange carriers" for purposes of the FCC's access charge rules.[37] *The Kansas commission reached the same conclusion when it found that "if the*

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[33] *47 C.F.R. § 69.5(b). See In the Matter of Access Charge Reform, CC 96-262, First Report and Order ¶ 22, 12 FCC Rcd. 15982 (rel. May 16, 1997) ("Part 69 specifies in detail the rate structure for recovering those costs. That is, the rules tell the incumbent LECs the precise manner in which they may assess charges on interexchange carriers and end users.").*

[34] *47 C.F.R. § 69.2(s).*

[35] *47 C.F.R. § 69.2(b).*

[36] *See Docket No. 28821, Arbitration Award—Track 1 Issues, INTERCARRIER COMPENSATION-JT DPL-FINAL at 1.*

[37] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access charges, WC 02-361, Order ¶ 19 n.80, 19 FCC Rcd. 7457 (rel. Apr. 21, 2004).*

ESP contracts with a third party to transport the VoIP calls, like Global Crossing, that third party's interexchange transport of the VoIP calls is subject to access charges assessed by an ILCEC [sic], like AT&T."[38] *Consequently, if UTEX is an IXC for a given communication, AT&T Texas may assess access charges upon UTEX even though UTEX holds itself out as providing only local exchange services.*

UTEX asserts that it is not subject to access charges because it does not provide telephone toll service, which is defined in the FTA as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[39] *Specifically, UTEX states that it does not impose a separate charge for service between exchange areas.*[40] *As the Second Circuit Court of Appeals found, "[t]his argument attributes far too much significance to the term 'separate charge.'"*[41] *According to the court:*

> *It seems likely that the "separate charge" language in the statute was written to underscore that "tolls" applied exclusively to long-distance service and were charged separately. But what really mattered in determining whether an access charge was appropriate was whether a call traversed local exchanges, not how a carrier chose to bill its customers.*[42]

Consistent with the court's decision, the Arbitrators conclude that UTEX may provide telephone toll service even if it does not impose a separate charge for service between exchanges. UTEX has consistently been vague about how traffic reaches its network. In his direct testimony, UTEX witness Mr. Feldman testified that UTEX's customers "meet us in the LATA" in which the calling or called AT&T Texas end user is located and that UTEX has a "logical connection" to its customer's equipment.[43] *Mr. Feldman further testified that "[w]hen we get a call it comes through the situs; it is in effect the 'demarcation point' between the customer's system and UTEX's system."*[44] *These statements do not describe the POP location of UTEX's ESP customer, which is necessary to determine whether UTEX is an IXC.*

UTEX has also stated that the public Internet or a private IP network may be used to transport communications between UTEX and its ESP customers. In Mr. Feldman's rebuttal testimony in Docket No. 33323, excerpts of which were admitted in this docket,

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[38] *In the Matter of the Petition of Southwestern Bell Telephone Company d/b/a AT&T Kansas for Compulsory Arbitration of Unresolved Issues with Global Crossing Local Service, Inc. and Global Crossing Telemanagement, Inc. for an Interconnection Agreement Pursuant to Sections 251 and 252 of the Federal Telecommunications Act of 1996, Docket No. 10-SWBT-419-ARB, Arbitrator's Determination of Unresolved Interconnection Agreement Issues Between AT&T and Global Crossing ¶ 30 (Kansas Corp. Comm'n Apr. 23, 2010).*

[39] *47 U.S.C. § 153(48).*

[40] *UTEX Ex. 1, Feldman Direct, at 252:11-13.*

[41] *Global NAPs, Inc. v. Verizon New England, Inc., 454 F.3d 91, 98 (2d Cir. 2006).*

[42] *Id.*

[43] *UTEX Ex. 1, Feldman Direct, at 253:17-18 & 253:8-9.*

[44] *Id. at 253:17-19.*

Mr. Feldman stated that "the media may or may not move through the public or private Internet depending on what the media is."[45] Furthermore, during the hearing on the merits in this docket, counsel for UTEX asked a number of questions about the compensation applicable to communications depicted in a set of call flow diagrams.[46] In response to a question from the Arbitrators regarding one of those diagrams, counsel for UTEX stated that "much of what's in between H and probably somewhere in between D and E would just be over the Internet."[47]

While UTEX has not been clear about how traffic reaches its network, the Arbitrators have reached several general conclusions about when UTEX would be an IXC and would, therefore, be subject to access charges. First, UTEX is an IXC when it owns, leases, or operates a network (e.g., a circuit-switched or private IP-based network) used to transport communications between UTEX and an ESP customer's POP located in an exchange other than an exchange in which the AT&T Texas calling or called end user is located. For such communications that originate or terminate[48] in different states or countries, UTEX provides a service integral to interstate or foreign telecommunications because the communications could not be completed without the service UTEX provides.[49] Furthermore, UTEX does not provide origination or termination for such communications because it transports the communications between exchanges rather than within an exchange.[50] Under the FCC's rules, therefore, UTEX would be an IXC subject to the FCC's rules for interstate and foreign access charges.[51] For such communications that originate and terminate in different local calling areas within Texas, UTEX provides a means of transporting intrastate telecommunications messages between local exchanges.[52] Under the Commission's rules, therefore, UTEX would be an IXC subject to intrastate access charges. The Arbitrators note that, while different access charge rules apply to interstate and intrastate communications (i.e., the FCC's rules and the Commission's rules), AT&T Texas's access charge rates are the same for interstate and intrastate interexchange communications.[53]

As discussed above, UTEX has stated that it may provide service using the public Internet. The Arbitrators conclude that UTEX is an IXC when it uses the public Internet

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[45] *UTEX Ex. 2, Feldman Direct Exhibits, at 107 (Feldman Rebuttal from Docket No. 33323 at 11:10-11).*

[46] *See, e.g., Tr. at 143:24-150:13 (Apr. 13, 2010).*

[47] *Tr. at 163:12-164:7 (Apr. 13, 2010) (discussing UTEX Ex. 13 at 4). The Arbitrators note that UTEX Ex. 13 does not include page numbers. For identification purposes, the call diagram at issue here refers to a called party number of 512-404-1000 and a calling party number of 500-888-1000.*

[48] *As discussed above, the origination and termination points of a communication will be determined using CPN.*

[49] *See 47 C.F.R. §§ 69.2(s), 69.5(b).*

[50] *As explained above in the Interstate and Intrastate Access Charge Rules section, FCC rules impose access charges on carriers that offer services other than origination and termination services that are an integral part of interstate or foreign telecommunications.*

[51] *See 47 C.F.R. §§ 69.2(b), 69.2(s), 69.5(b).*

[52] *P.U.C. SUBST. R. 26.5(107).*

[53] *See Informational Notice – Implementation of Concurrence of Interstate and Intrastate Switched-Access Tariffs, Tariff No. 38042 (Mar. 10, 2010).*

to transport communications between itself and an ESP customer whose POP is located in an exchange other than the exchange in which the AT&T Texas calling or called end user is located. In the IP-in-the-Middle order, the FCC concluded that access charges applied when an IXC (in that case, AT&T) used the public Internet to transport communications between PSTN users in different exchanges. In response to comments that access charges should not apply when a carrier transports communications using the public Internet rather than a private IP-based network, the FCC stated the following:

> *These commenters, however, fail to explain why using the Internet, as opposed to a private IP network or some other type of network, is at all relevant to our analysis of whether AT&T's specific service should be assessed interstate access charges, particularly here where AT&T merely uses the Internet as a transmission medium without harnessing the Internet's broader capabilities. In the IP-Enabled Services rulemaking proceeding it is possible that we may draw such distinctions, but we have not done so under our current rules.*[54]

Thus, the FCC concluded that its existing rules do not exempt public Internet based interexchange services from access charges. The FCC further stated that "[w]e do not believe that a service of the type described above – which provides no enhanced functionality to the end user due to the conversion to IP – is the kind of use of the 'Internet or interactive services' that Congress sought to single out for exceptional treatment."[55] *Just as AT&T merely used the Internet as a transmission medium in the IP-in-the-Middle Order, UTEX would also merely be using the Internet to transport communications between exchanges.*[56] *Both UTEX and its customer would have to acquire Internet access in such a circumstance, and the two effectively would collaborate to transport the communication between exchanges. The Arbitrators do not agree with UTEX's characterization that UTEX's ESP customer transports communications from the ESP's location to UTEX's location over the Internet and that UTEX does not participate in that transport. Rather, both UTEX and its customer are involved in transporting the communication over the Internet.*

In the ESP Point of Presence section above, the Arbitrators concluded that an ESP or other entity has a POP at the point that its network physically connects with a LEC's network (e.g., UTEX's network). UTEX asserts that it has a "logical connection" with its ESP customers,[57] *but has not explained what that means. To the extent that UTEX means that it uses the Internet to connect to its ESP customer, the Internet does not itself establish a POP for the ESP customer in the local calling area where UTEX is located.*

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[54] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access charges, WC 02-361, Order ¶ 17, 19 FCC Rcd. 7457 (rel. Apr. 21, 2004) (emphasis added).*

[55] *Id.*

[56] *Id.*

[57] *UTEX Ex. 1, Feldman Direct, at 253:8-9 ("We do have a logical connection to our customer's equipment").*

UTEX states that "the fact that the hand-off is 'virtual' cannot have any significance" and that "[a] ruling that hardware rather than software is required would violate § 157 of the Act, and clearly indicate a bias against more efficient new technology entering to compete against inefficient and antiquated old technology."[58] *The Arbitrators' decision does not prohibit UTEX and its ESP customer from using a logical connection or a virtual hand-off. Nor does the Arbitrators' decision result in a bias against those technologies because the Arbitrators have not imposed access charges upon those technologies for communications that would not be subject to access charges if transported using traditional technologies.*

To illustrate how these rulings should be applied in various situations, the Arbitrators provide the following three examples. First, assume that UTEX's ESP customer has physical facilities in another state and that the public Internet is used to transport communications between those facilities and UTEX. In this example, UTEX would be an IXC because, as explained above, UTEX would be using the Internet to transport communications between exchanges.

Second, assume that UTEX's ESP customer has a POP in Local Calling Area 1 (LCA1) and the AT&T Texas calling or called end user is located in Local Calling Area 2 (LCA2). LCA1 and LCA2 are located in the same LATA. In this example, UTEX would also be an IXC because UTEX would be responsible for transporting the communication from one local calling area to another. The Arbitrators note that the Commission's single point of interconnection (POI) rule allows a CLEC to establish one POI in each LATA as a market entry mechanism.[59] *That is, a CLEC does not need a separate POI with the ILEC in each local calling area within a LATA; rather, the CLEC can establish one POI with the ILEC in one local calling area and use that POI to serve customers in other local calling areas within the same LATA. Depending on the location of UTEX's POI with AT&T Texas, UTEX may not actually transport a communication from one local calling area to another. Instead, UTEX may pass the communication to AT&T Texas in one local calling area and AT&T Texas may then transport the communication to another local calling area for termination to AT&T Texas's customer. In such a case, UTEX would nevertheless be responsible for the interexchange communication and would be subject to access charges, because it provides a service integral to the communications by delivering the call to AT&T Texas and the communications could not be completed without the service UTEX provides.*[60]

Finally, assume that UTEX's ESP customer has physical facilities in the local calling area in which the AT&T Texas calling or called end user is located and that the public Internet is used to transport communications between those facilities and UTEX.

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[58] *Id. at 254 n.22.*

[59] *Docket No. 28821, Arbitration Award – Track 1 issues at 16 (February 22, 2005). The Commission also concluded that CLECs shall establish additional POIs when traffic exceeds 24 DS1s. Id.*

[60] *As explained above in the Interstate and Intrastate Access Charge Rules section, FCC rules impose access charges on carriers that offer services other than origination and termination services that are an integral part of interstate or foreign telecommunications. As also explained above in that section, the Commission's rules impose access charges on carriers that transport intrastate telecommunications traffic between local exchanges.*

In connection with service provided over the Internet, the FCC has described a POP as "a physical location that houses servers, routers, switches and aggregation equipment."[61] *If UTEX's ESP customer has that kind of equipment in the local calling area in which the AT&T Texas calling or called end user is located, then UTEX's ESP customer has a POP in that local calling area. Consequently, the ESP Traffic provisions of the ICA would apply in this example assuming that the other requirements for ESP Traffic are met. The mere fact that the Internet is used to transport communications between UTEX's ESP customer and UTEX does not itself make the ESP Traffic provisions of the ICA inapplicable.*

UTEX stated in its exceptions that allowing AT&T Texas to recover access charges for calls originated by AT&T Texas violates FCC Rules 51.701(e) and 51.703(b).[62] *Those rules apply only to calls subject to reciprocal compensation, however, and do not apply to calls subject to access charges.*[63] *IXCs typically pay access charges to both the originating and terminating LECs, and this does not violate FCC rules.*

UTEX stated in its exceptions that it cannot be subject to access charges when AT&T Texas transports a call between exchanges in a LATA.[64] *As stated above, the Commission established the single POI rule as a market entry mechanism, and a carrier must establish additional POIs when its call volume exceeds 24 DS1s. In establishing the single POI rule, the Commission did not exempt a carrier from intraLATA access charges. Consequently, if UTEX chooses to avail itself of the single POI rule, it is nevertheless subject to access charges.*

UTEX stated in its exceptions that a call from the Internet is not an interexchange call because, as a factual matter, such a call is not originated from an exchange.[65] *UTEX did not cite any evidence in support of this assertion. Furthermore, UTEX's assertion is inconsistent with the FCC's treatment of ISP-bound traffic. In the ISP Declaratory Order, the FCC stated that ISP-bound traffic uses interstate access services.*[66] *The FCC reached this conclusion even though ISP-bound traffic terminates to the Internet.*[67] *The FCC implicitly rejected, therefore, UTEX's argument here that a communication is not interexchange if it originates from or terminates to the Internet. The Arbitrators conclude that a communication may be interexchange even if it originates from the Internet.*

The short answer by the Texas PUC is ***yes***. VoIP traffic handled outside of the "dual POP test" turns the CLEC into an IXC. FeatureGroup IP asserts this ruling is legal error as it

[61] *In the Matter of Connect America Fund, WC 10-90, Notice of Inquiry and Notice of Proposed Rulemaking at Glossary, 25 FCC Rcd. 6657 (rel. Apr. 21, 2010).*

[62] *UTEX Exceptions at 30.*

[63] *47 C.F.R. § 51.701(a).*

[64] *UTEX Exceptions at 38-39.*

[65] *UTEX Exceptions at 39.*

[66] *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC 96-98, Declaratory Ruling ¶ 5, 14 FCC Rcd. 3689 (rel. Feb. 26, 1999).*

[67] *Id. ¶ 4.*

effectively expands and misuses the "*IP-In-the-Middle* Order" logic to calls that have only one PSTN end point, thus turning "*IP-in-the-Middle*" into "IP-at-one end-and-ILEC-at-the- Other."

Sub Issue 4: What rules are needed to discourage "Phantom Traffic?" Is non-geographic VoIP "Phantom Traffic?" Can CPN be used in some or all circumstances to remove LEC-LEC traffic from § 251(b)(5) and place within § 251(g) with the result that one LEC must pay another LEC access charges?

To resolve the so called "Phantom Traffic Issue," the Texas PUC interpreted current law to adopt a perceived "valid" and "invalid" industry standard with respect to CPN. The Arbitrators ruled that if more than 10% of traffic not meeting the ESP test contains "invalid" CPN then the CLEC must pay access charges. For CPN to be "valid" it must resolve to an active geographic LERG number. Non-geographic CPN such as UTEX's 500 numbers and 8yy numbers are still considered "invalid" even though they meet the FCC's definition of CPN.

Both "Valid" and "invalid" CPN, then, shall be used by the ILEC to rate calls and bill the CLEC for all traffic "misrouted" over the local interconnection trunk groups including non-local VoIP traffic as determined by CPN. Thus for "misrouted" traffic, which is either "phantom" traffic in excess of 10% or traffic with foreign CPN, the CLEC is billed access charges by the ILEC.

This mandatory use of valid CPN is still subject to the ESP Exemption and "ESP Traffic." ESP Traffic routed over the ESP Traffic Trunk Group is not deemed to be "misrouted" even if it does not contain "valid" CPN. ESP Traffic routed over the ESP Traffic Trunk Group is not rated or billed based on CPN, and all such traffic is subject to § 251(b)(5) requirements.

CPN Requirements *(Page 50)*

The Arbitrators conclude that the parties must provide CPN for ESP Traffic consistent with the requirements established in connection with DPL Issue AT&T NIM 6-

5. While CPN is not necessary to determine the rating for ESP Traffic, which is subject to the Local Traffic compensation rules, CPN is necessary for the appropriate rating and billing of any non-ESP Traffic that is misrouted onto the ESP Traffic trunk. The issue of the appropriateness of requiring parties to deliver CPN information for traffic exchanged between the parties and what constitutes a valid CPN is addressed in greater detail under DPL Issue AT&T NIM 6-5."

(Excerpts from NIM 6-5 from 26381 Award Attachment B pp 225-238 **emphasis added by bolding certain statements**)

The Arbitrators address the delivery of CPN and trunking associated with ESP traffic in the text of the Award in the section titled "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers."

…The Arbitrators conclude that the parties should provide the Calling Party Number (CPN) information, where technically available to the transmitting party. The Arbitrators note that the FCC and the Commission have recognized the importance of CPN as a rating tool so that calls are properly jurisdictionalized and billed the appropriate compensation rates. In addressing the use of CPN for purposes of billing for calling card traffic, the FCC concluded that CPN should be used to ensure accuracy in billing because "this approach balances the need for accurate intercarrier billing records with the need for some carriers to use CN [Charge Number] for their own retail billing purposes." (In the Matter of Regulation of Prepaid Calling Card Services, WC Docket No. 05-68, Declaratory Ruling and Report and Order at ¶¶ 33 and 34 (rel. June 30, 2006)). The Arbitrators also note that the Commission found in Docket No. 33323 that the CPN provides telecommunications providers with a geographic origination point associated with the call so the terminating and transiting providers can determine the jurisdiction of the call and apply the appropriate compensation rates and bill for the call. (Docket No. 33323, Arbitration Award at 80 (June 1, 2009)).

AT&T Texas's proposed language in § 2.1 requires each party to provide Calling Party Number (CPN) as defined in 47 C.F.R. §64.1600(c), which is the FCC's definition of CPN. That rule states, "The term 'Calling Party Number' refers to the subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call on a Signaling System 7 network." The Arbitrators note that in Docket No. 33323, the Commission found that the FCC's definition of CPN refers to a telephone number as specified in the North American Numbering Plan (NANP) numbering scheme where a telephone number consists of ten-digits represented by the format: NPA-NXX-NXXX. (Docket No. 33323, Arbitration Award at 78-80 (June 1, 2009)). Consistent with the Commission's decision in Docket No. 33323, ***the Arbitrators find that a valid CPN is the actual telephone number of the calling party (a NANP ten-digit number) listed in the Local Exchange Routing Guide (LERG)****.*

UTEX stated in its exceptions that the decision on what constitutes CPN in Docket No. 33323 went far beyond merely applying the FCC's definition of CPN in FCC Rule 64.1600(c), and the additional criterion that the number be "geographic" is inconsistent with the FCC's rule because non-geographic numbers are also CPN under the FCC's rule. UTEX Exceptions at 23-24. In its order addressing the regulation of prepaid calling card services, the FCC concluded that prepaid calling card providers

were subject to its rules on the passing of CPN. The FCC stated in that order, "In a standard interexchange call, the CPN will be passed as part of the SS7 signaling message, and the carriers involved in the call should be able to determine the jurisdiction based on a comparison of the calling and called party telephone numbers." In the Matter of Regulation of Prepaid Calling Card Services, WC Docket No. 05-68, Declaratory Ruling and Report and Order ¶ 32 (rel. June 30, 2006). While the FCC recognized that the emergence of wireless and IP-based calling options made it less likely that a comparison of telephone numbers would provide meaningful information on the geographic end points of a call, it stated, "Nevertheless, for now carriers continue to rely on telephone numbers as a proxy for geographic location." Id. n. 89. ***The Arbitrators find that delivery of non-geographic numbers as proposed by UTEX that do not reflect the geographic origination point associated with the call would not enable AT&T Texas and UTEX to determine the proper jurisdiction of the call based on a comparison of the calling and called party telephone numbers and apply the appropriate compensation rates and bill for the call. Therefore, the Arbitrators' adoption of the Commission's decision in Docket No, 33323 that a valid CPN is the actual telephone number of the calling party (a NANP ten-digit number) is consistent with the FCC's application of its CPN rule.***

UTEX stated in its exceptions that the Arbitrators' reliance on the decisions in Docket No. 33323 for CPN issues was inappropriate because in Docket No. 33323, it was determined that UTEX had agreed to a voluntary industry standard to apply CPN-based rating on all of its traffic while in this proceeding it had not voluntarily agreed to change the rating of a §251(b)(5) call based upon the lack of CPN. UTEX Exceptions at 32-33. The Arbitrators find that UTEX's arguments are misplaced. The parties have offered competing ICA language on CPN issues and the Arbitrators have adopted AT&T Texas's proposed ICA language regarding the parties' obligations for the provision of CPN as defined by the FCC and the appropriate compensation that would be applicable to calls without CPN. ***As discussed above, the FCC and the Commission in Docket No. 33323 have determined that the FCC's definition of CPN refers to the actual telephone number of the calling party (a NANP ten-digit number), which includes geographically valid NPA and NXX so that the carriers involved can determine the jurisdiction of the call based on the comparison of the calling and called party telephone numbers. The Arbitrators, therefore, disagree with UTEX that a CPN requirement has to be voluntarily agreed to before it can be adopted by the Arbitrators or that the CPN provisions approved for the ICA are inconsistent with the FTA or FCC rules.***

UTEX stated in its exceptions that CPN is never relevant to the classification of traffic as § 251(b)(5) traffic because, under the Act (at least after the FCC's Core Mandamus Order), all traffic between LECs is §251(b)(5), without exception. UTEX stated the requirement in the text of the Award in the section titled "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers" that CPN be provided to ensure appropriate rating and billing of any non-ESP Traffic that is misrouted onto the ESP Traffic trunk is legally incompatible with §251(b)(5) of the Act. UTEX Exceptions at 31. The terms of the ICA approved by the Arbitrators address the intercarrier compensation for the various categories of traffic including ESP Traffic exchanged between UTEX and AT&T Texas and termination of Interexchange Toll Traffic when either Party is an IXC.

The intercarrier compensation rates for these categories of traffic are not the same. ***Therefore, the delivery of CPN is necessary to ensure that the jurisdiction for non-ESP traffic is properly identified so that the traffic is rated and compensated according to the terms of the ICA.*** *The Arbitrators find that the intercarrier compensation and CPN provisions approved by the Arbitrators are consistent with FTA §§251 and 252 and FCC rules regarding these issues.*

…….

UTEX stated in its exceptions that the Act and the FCC rules do not allow the Arbitrators to apply "industry standards" or "best practices" to answer questions for which there is already legal precedent or when the "industry standard" is wrong on its face. UTEX Exceptions at 36-37. The Arbitrators find that the standard industry practice of using CPN for billing purposes, unlike UTEX's proposed rating tools, accomplishes what the FCC has found to be the purpose of relying on CPN in an interexchange call, namely, ensuring that the carriers involved are able to determine the jurisdiction of the call based on the calling and called party telephone numbers. The Arbitrators, therefore, conclude that it is appropriate to consider industry-wide practices rather than adopt CPN requirements that are unique to a CLEC and have not been shown to accomplish the FCC's stated purpose of using CPN for billing purposes.

UTEX states in its exceptions that a VoIP user need not have a geographic number in order to be called by a user on the PSTN and that a PSTN user can dial an 8YY number or a 500 number to reach a VoIP customer. UTEX Exceptions at 37-38. The Arbitrators note that while 8YY and 500 numbers may be non-geographic, they generally, require geographic numbers behind them with valid CPN if the call is to be properly routed to the customer subscribing to 8YY or 500 services. In any event, the CPN requirements apply to the calling party number and, for reasons described above, a call delivered from a UTEX subscriber of its 8YY or 500 service must be the actual telephone number of the calling party (a NANP ten-digit number) listed in the Local Exchange Routing Guide (LERG) before it can be considered a valid CPN.

… With respect to compensation for traffic without CPN, the Arbitrators note that AT&T's proposal is consistent with the Commission's decision in Docket Nos. 21982 and 28821. In response to Intercarrier Compensation Issue SBC-23 in Docket No. 28821, the Commission affirmed its prior decisions and found that if the percentage of calls passed with CPN is greater than 90 percent, then all calls exchanged without CPN information will be billed as either local traffic or intraLATA toll traffic in direct proportion to the MOUs of calls exchanged with CPN information. However, if the percentage of calls passed with CPN is less than 90 percent, all calls passed without CPN will be billed as intraLATA toll traffic. (Docket No. 28821, Arbitration Award – Track 1 Issues, Intercarrier Compensation –JT DPL – Final, DPL Issue SBC-23 at page 41 of 84 (February 22, 2005)). The Commission in Docket No. 28821 concluded that the 90/10 CPN requirement would serve as an incentive to parties to continue to send CPN information for their intercarrier calls and minimize any potential for arbitrage. The Arbitrators find that UTEX's proposed threshold of 60% traffic with CPN, in § 7.5 of Attachment 6 to NIM: Intercarrier Compensation would allow for 40% of its traffic to be passed unidentified and would fail to provide the necessary incentive for parties to send CPN information in calls and fail to sufficiently minimize the potential for

arbitrage. UTEX's proposal also is silent about the remedy when the percentage of traffic passed with CPN falls below 60%. The Arbitrators note that UTEX has proposed different terms in § 7.4 in "Exhibit 3 – Compensation Terms for mutual exchange of SS7 traffic." Those terms do not address the remedy if the percentage of traffic without CPN falls between 60% and 90%. The Arbitrators find that UTEX has not provided support for its proposal in § 7.4 in "Exhibit 3 – Compensation Terms for mutual exchange of SS7 traffic," to subject traffic without CPN, to a rate that is double the terminating Party's compensation rate (namely, $0.0014), if the percentage of calls passed with CPN is less than 60%. Furthermore, UTEX's proposal would not provide the incentive needed for parties to continue to send CPN information for intercarrier calls and minimize the potential for arbitrage. The Arbitrators therefore decline to adopt UTEX's proposal in §7.5 of Attachment 6 to NIM: Intercarrier Compensation or in § 7.4 in "Exhibit 3 – Compensation Terms for mutual exchange of SS7 traffic."

UTEX stated in its exceptions that its 2005 proposed 60/40 "no CPN" provision should be read in the context of its definition of CPN, which is not the same as AT&T Texas's CPN definition, and that there was never an implicit or explicit "validity" standard in its proposed 2005 CPN ICA language. UTEX Exceptions at 32. The Arbitrators note that UTEX's proposed definition of CPN is identical to the FCC's definition of CPN in 47 C.F.R. § 64.1600(c) and, for the reasons described above, the Arbitrators find that the FCC's CPN definition refers to the actual telephone number of the calling party (a NANP ten-digit number) listed in the LERG. The Arbitrators also conclude that without a standard for valid CPN and a reasonable method to address compensation for calls without CPN, such as the 90/10 CPN requirement proposed by AT&T Texas, the parties would be unable to determine the proper jurisdiction of the call and would not have the incentive to send CPN information for their intercarrier calls and minimize any potential for arbitrage.

UTEX stated in its exceptions that the Arbitrators rebutted ICA language that UTEX no longer supports, rather than UTEX's current proposal. UTEX Exceptions at 29. The Arbitrators ruled in Order Nos. 27 and 30 that UTEX had not presented sufficient justification for presenting a different position on this issue than the one set forth in UTEX's Second Amended Petition, which was filed in 2005. Order No. 27 at 2; Order No. 30 at 2-3. Because the Arbitrators previously declined to consider UTEX's more recent proposal, UTEX's 2005 ICA language was the only other UTEX language addressing these issues.

(c) The trunking for ESP traffic is addressed in the text of the Award in the section titled "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers." The Arbitrators conclude that it is appropriate to include language in the ICA that would prohibit the use of local exchange trunks to deliver interexchange traffic in all other cases.

The Arbitrators find that UTEX's proposed language and AT&T Texas's proposed language for §§ 2.0- 2.2 are fairly similar to the language approved by the Commission in Docket No. 28821 for the CLEC Coalition ICA. However, the Arbitrators modify the parties' proposed language for §§ 2.1-2.2 to make it consistent with the language in the CLEC Coalition ICA and the Arbitrators' decision on intercarrier compensation for ESP traffic as well as reflect the Arbitrators' decision on what constitutes a valid CPN:

"2.1 Each Party to this Agreement will be responsible for the accuracy and quality of its data as submitted to the respective Parties involved. For all traffic including, without limitation, Interexchange circuit-switched traffic, IP traffic, ESP Traffic, ~~Switched Access Traffic~~ and wireless traffic, each Party shall provide Calling Party Number ("CPN") as defined in 47 C.F.R. § 64.1600(c) ("CPN"). ~~in accordance with Section 2.3~~. In addition, each Party agrees that it shall not strip, alter, modify, add, delete, change, or incorrectly assign any CPN. CPN shall, at a minimum, include information that accurately reflects the physical location of the end user that originated and/or dialed the call, when including such information is technically feasible and be a Signaling System 7 "SS7" parameter whereby the telephone number (a NANP ten-digit number) of the calling Party is forwarded from the End Office. If either party identifies improper, incorrect, or fraudulent use of local exchange services (including, but not limited to PRI, ISDN, and/or Smart Trunks), or identifies stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned CPN, the Parties agree to cooperate with one another to investigate and take corrective action. For traffic that qualifies as ESP Traffic, CPN provided by either party shall not be used for rating or billing of such traffic.

2.2 Each Party will include in the information transmitted to the other for each call being terminated on the other's network (where technically available to the transmitting party), the originating Calling Party Number (CPN)."

AT&T Texas's proposed language in § 2.3 reflects the Commission's decision in Docket Nos. 21982 and 28821 regarding the 90/10 CPN rule. The Arbitrators adopt AT&T Texas's proposed language in § 2.3 with modifications to ensure that ESP traffic is not subject to the 90/10 CPN rule in light of the Arbitrators' decision in the text of the Award in the section titled "Intercarrier Compensation for Traffic Involving UTEX's ESP Customers" that CPN is not necessary to determine the rating for ESP Traffic and that AT&T Texas and UTEX shall establish separate trunk groups for routing of ESP Traffic. In addition, the reference to "§ 251(b)(5) Traffic" should be replaced with "Local Traffic" for reasons delineated under DPL Issue AT&T NIM 6-1.

For traffic other than ESP Traffic that ~~which~~ is delivered by one Party to be terminated on the other Party's network, if the percentage of such calls passed with CPN is greater than ninety percent (90%), all calls delivered by one Party to the other for termination without CPN will be billed as either ~~Section 251(b)(5)~~ Local Traffic or IntraLATA Toll Traffic in direct proportion to the total MOUs of calls delivered by one Party to the other with CPN. For traffic other than ESP Traffic that is delivered by one Party to be terminated on the other Party's network, ~~If~~ if the percentage of calls passed with CPN is less than 90%, all calls delivered by one Party to the other without CPN will be billed as Intrastate IntraLATA Toll Traffic.

…..

Sub Issue 5: Can a CLEC bill an IXC when the CLEC provides service to an ESP and that ESP is part of a completed call to or from a PSTN end-point? Is this Jointly Provided Access when the ILEC also participates in this call?

The Texas PUC answer differs from the recent April 8th "Magic Jack" decision where AT&T Long Distance claimed and the Commission appeared to agree that both ends of a call must be on the PSTN for any § 251(g) based access tariff to apply. If AT&T Long Distance's logic is applied consistently then the *IP-in-the-Middle* order cannot be extended to functionally turn UTEX/FeatureGroup IP into an IXC when either end of the call is not on the PSTN. Alternatively, the Commission's recent decision could be distinguished from the Texas PUC resolution applying a "dual POP" test since the ESP will have a physical POP and FeatureGroup IP will be "terminating to" or "originating from" that physical POP. In any event, below is how the TPUC Arbitration team resolved this open issue:

> ***Jointly Provided Access*** **(Award Pages 59-62*)***
>
> *The Arbitrators acknowledge that there may be situations in which UTEX is not an IXC and instead jointly provides exchange access with AT&T Texas. AT&T Texas claims that UTEX does not provide exchange access because "[i]t is AT&T Texas – not UTEX – that is providing access service when AT&T Texas terminates long-distance traffic to its end user customers."[68] While AT&T Texas seems to challenge the very idea that a CLEC can jointly provide exchange access with an ILEC, the FCC has explicitly recognized this possibility. In addressing the switched access rates that CLECs may charge to IXCs, the FCC noted that "there are situations where a competitive LEC may bill an IXC on behalf of itself and another carrier for jointly provided access services pursuant to meet point billing methods."[69] The FCC then acknowledged the intermediate role that a CLEC may assume in such circumstances: "[W]e find that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same*

[68] *AT&T Texas Reply Br. at 15.*

[69] *In the Matter of Access Charge Reform, CC 96-262, Eighth Report and Order and Fifth Order on Reconsideration ¶ 16, 19 FCC Rcd. 9108 (rel. May 18, 2004).*

functions."[70] As a general matter, therefore, the Arbitrators conclude that there may be circumstances in which UTEX jointly provides exchange access with AT&T Texas.

Under DPL Issue AT&T NIM 6-11, the Arbitrators have approved ICA language allowing AT&T Texas and UTEX each to bill an IXC using the MECAB guidelines when AT&T Texas and UTEX jointly provide exchange access. The MECAB guidelines are designed to produce accurate, verifiable, and auditable bills in multiple provider situations.[71] Those guidelines require each provider to identify the IXCs that have a direct connection to the provider's network. Among other things, a provider must identify the carrier identification code (CIC) assigned by the North American Numbering Plan Administration (NANPA) and the access customer terminal location (ACTL) identifier for each IXC that is directly connected to the provider.[72]

The Arbitrators conclude that in cases where an IXC connected to UTEX does not have a CIC and ACTL identifier, AT&T Texas may bill UTEX directly rather than billing the IXC itself. In its Time Warner Order, the FCC noted that Time Warner's petition described a wholesale/retail provider relationship in which the wholesale carriers assumed responsibility for compensating the ILEC for termination of traffic between those two parties.[73] The FCC adopted this arrangement as an explicit condition of the interconnection rights granted to Time Warner in its order.[74] The Arbitrators conclude that this same condition should apply here when UTEX's IXC customers do not have a CIC and ACTL identifier, as required by the MECAB guidelines. The Arbitrators provide language implementing this requirement below.

UTEX stated in its exceptions that the Arbitrators have imposed single company billing, which was ruled unreasonable and illegal by the FCC.[75] Nothing in the Arbitrators' decision, however, requires a LEC to charge "rates based on the tariff of a LEC other than the one providing service to the customer."[76] Therefore, this Award does not impose single company billing.

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[70] *In the Matter of Access Charge Reform, CC 96-262, Eighth Report and Order and Fifth Order on Reconsideration ¶ 17.*

[71] *UTEX Ex. 4, Feldman Rebuttal Exhibits, at 92 (MECAB Guidelines §§ 1-2.1).*

[72] *Id. at 123 (MECAB Guidelines § 5.3.2).*

[73] *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC 06-55, DA 07-79, Memorandum Opinion and Order ¶ 1, 22 FCC Rcd. 3513 (rel. Mar. 1, 2007).*

[74] *Id. ¶ 17.*

[75] *UTEX Exceptions at 44.*

[76] *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC 86-104, Memorandum Opinion and Order ¶ 3, 2 FCC Rcd. 4518 (rel. July 31, 1987).*

ICA Language

For the reasons explained above, Attachment 6 to NIM: Intercarrier Compensation should be modified as follows:[77]

5.0 ~~Reciprocal~~ Compensation for Termination of IntraLATA and InterLATA Interexchange Toll Traffic When a Party is an IXC.

5.2 For intrastate intraLATA interexchange ~~service~~ traffic~~,~~ not considered Local Traffic, ISP-Bound Traffic, ESP Traffic, Optional EAS Traffic, FX traffic, FGA Traffic, Meet Point Billing Traffic, or Cellular Traffic, compensation for termination of this traffic will be at terminating access rates for Message Telephone Service (MTS) and originating access rates for 800 Service, including the Carrier Common Line (CCL) charge, as set forth in each Party's intrastate access service tariff. For interstate intraLATA service, compensation for termination of this traffic will be at terminating access rates for MTS and originating access rates for 800 Service including the CCL charge, as set forth in each party's interstate access service tariff.

5.3 For interLATA interexchange traffic, compensation for termination of this traffic will be at access rates as set forth in each Party's own applicable interstate or intrastate access tariffs.

6.0 Compensation for Origination and Termination of Switched Access Service Traffic to or from ~~an~~ a Third-Party Interexchange Carrier (IXC) (Meet-Point Billing (MPB) Arrangements).

6.1 For interLATA traffic and intraLATA traffic, compensation for origination or termination of intercompany Meet Point Billing traffic will be at access rates as set forth in each Party's own applicable interstate or intrastate access tariffs. When such traffic is contained in the Optional Calling Areas, compensation will be applied pursuant to Section 8.0 below.~~5.0 above~~.

6.7 If an IXC interconnected to a Party does not have a CIC assigned by NANPA and an ACTL identifier, the other Party may bill the interconnecting Party instead of billing the IXC.

[77] *The Arbitrators note that they have provided additional intercarrier compensation ICA language in connection with DPL Issues AT&T NIM 6-10 and 6-11. The parties may renumber these sections during the conforming process as appropriate.*

Sub Issue 6: What are the appropriate conditions for a CLEC's provision of "Transit" services and does an ILEC have the right to demand direct interconnection with a CLEC or CMRS provider?

During the April 6 workshop several ILECs, such as Windstream,[78] complained that CLECs and other carriers were refusing to directly interconnect with them. The ILECs requested a right akin to that granted in the *T-Mobile Order*[79] allowing an ILEC to demand interconnection with CMRS providers under 47 C.F,.R. § 20.11(e). Since AT&T the ILEC has publicly stated that it refuses to invest in IP voice technology such as SIP, FeatureGroup IP anticipates servicing carriers, especially new entrants, who do not wish to invest in Legacy SS7 technologies. The Texas PUC basically ruled that while ILECs do have a right to directly connect for the exchange of telephone exchange service and exchange access traffic under § 251(c)(2),[80] CLECs also have a right to provide transit to other carriers that desire to use indirect interconnection. Below is the TPUC Arbitration Team's resolution of the "Transit" issues in the UTEX/AT&T arbitration as follows from pages 72-76.:

Arbitrators' Decision

Consistent with the Commission's decision in Docket No. 28821, the Arbitrators conclude that AT&T Texas is required to provide transit services at total element long-run incremental cost (TELRIC) rates. Given AT&T Texas's ubiquitous network in Texas and the evidence in Docket No. 28821 regarding an absence of alternative competitive transit providers in Texas, the Commission found in Docket No. 28821 that imposing an

[78] *See also* Windstream April 1, 2011 comments, pp. 17-19.

[79] *Declaratory Ruling and Report and Order, In the Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, CC Docket 01-92, FCC 05-42, 20 FCC Rcd 4855 (2005) ("T-Mobile Order").*

[80] *It seems a bit incongruous for an RLEC to demand the right to require CLECs to enter interconnection agreements for so long as the RLEC is also claiming an exemption from § 251(c) as a result of § 251(f).*

obligation on AT&T Texas to provide transit services at cost-based rates will promote interconnection of all telecommunications networks.[81]

With respect to provision of transit services by UTEX, the Arbitrators note that in Docket No. 28821, the Commission found that in the interest of promoting the entry of alternative transit providers in the market, it is reasonable to permit a CLEC to serve as a transit provider instead of the ILEC.[82] *However, the Commission also recognized that direct interconnection between the originating and terminating carriers, in contrast to indirect interconnection through a third party transit provider, reduces the potential for billing disputes as well as encourages efficient network interconnection.*[83] *Therefore, the Commission concluded in Docket No. 28821 that the terminating carrier shall accept transit traffic if direct interconnection with the originating carrier is unavailable.*[84] *In other words, the originating carrier's obligation to route traffic through the transit carrier and pay the transit carrier for its service comes into play only if direct interconnection between the originating carrier and the third party carrier is unavailable. Consistent with the Commission's decision in Docket No. 28821, the Arbitrators require AT&T Texas to route traffic destined for a third party carrier using UTEX's transit service and pay UTEX for transit service only if direct interconnection between AT&T Texas and the third party carrier is unavailable.*

The Arbitrators also adopt the Commission's decision in Docket No. 28821 regarding the billing of transit services, which required AT&T Texas, as a transit carrier, to provide Operating Company Number (OCN) and/or CPN information to the terminating carrier to the extent AT&T Texas receives such information from the originating carrier or can provide such information.[85] *The Arbitrators impose this obligation reciprocally on UTEX when it serves as the transit carrier. In addition, consistent with the Commission's decision in Docket No. 28821, which affirmed prior determinations on the billing of transit service, the Arbitrators find that regardless of whether the traffic can be identified through CPN or OCN information, the terminating carrier shall be required to directly bill the originating carrier that sends traffic over the transit carrier's network.*[86] *The Arbitrators, therefore, conclude, except for the transit rates discussed herein, which apply when either party purchases the transit service of the other party to send originating calls, the transit carrier is not obligated to pay intercarrier compensation for the traffic exchanged between the originating and terminating carriers and, instead, the terminating carrier should establish separate compensation and billing arrangements with the originating carrier.*

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[81] *Docket No. 28821, Arbitration Award – Track 1 Issues , Intercarrier Compensation –JT DPL – Final , DPL Issue SBC-17 at page 19 of 84 (February 22, 2005).*

[82] *Id., DPL Issue SBC – 18 at page 26 of 84.*

[83] *Id.*

[84] *Id.*

[85] *Id., DPL Issue SBC – 17 at page 20 of 84.*

[86] *Id.*

The Arbitrators note that the Commission-established rates for transit service in Docket No. 28221 for various types of traffic including local traffic were specific to transit services provided by AT&T Texas. While UTEX refers to the transit rate of $0.00096, which the Arbitrators note is the transit rate for local traffic approved in Docket No. 28821, UTEX has indicated that the transit rates are not an issue for UTEX, as long as they are mutual and reciprocal so that they apply both when AT&T Texas provides the transit function and when UTEX provides the transit function. AT&T Texas has not objected to the application of the transit rates established by the Commission in Docket No. 28821 for various types of traffic including local traffic. Accordingly, the Arbitrators conclude that the ICA should reflect the Commission-approved transit rates in Docket No. 28821 for the various types of traffic including local traffic.

The Arbitrators decline to differentiate between affiliate and non-affiliate third party carriers for the application of the transit rates, as UTEX proposes. The Arbitrators find that in light of the requirement in FTA § 251(a)(1), which imposes a duty on all telecommunications carriers to interconnect directly or indirectly with other telecommunication carriers, it is not appropriate to adopt unique requirements with respect to transit service compensation depending on whether the traffic is exchanged with a third party that is affiliated with either UTEX or AT&T Texas. In addition, the Arbitrators note that the language approved by the Commission in Docket No. 28821 for the CLEC Coalition ICA regarding CLEC provided transit services does not differentiate between affiliate and non-affiliate third party carriers.

The Arbitrators note that AT&T Texas's proposed language on transit service does not reflect all the relevant provisions relating to transit service, including provisions authorizing transit services by a CLEC. Given that AT&T Texas recommends the adoption of the language approved for the CLEC Coalition ICA in Docket No. 28821 and UTEX seeks the same result as the Commission's decision in Docket No. 28821, the Arbitrators adopt, with modifications, §§ 7.0-7.10 in Attachment 12: Compensation on transit service, which was approved by the Commission in Docket No. 28821 for the CLEC Coalition ICA. The Arbitrators direct the parties to modify the CLEC Coalition ICA language on transit services such that the provisions apply reciprocally. Furthermore, all references to § 251(b)(5) traffic should be replaced with "local traffic" for reasons delineated in DPL Issue AT&T NIM 6-1 and the reference to "Originating Carrier Information" as the definition for the acronym "OCN" should be replaced with "Operating Company Number," which is the technical meaning of "OCN" in Newton's Telecom Dictionary.[87] *In addition, the last sentence of § 7.9 should be modified as follows:*

> ~~*Unless CLEC requests otherwise,*~~ ~~*t*~~*The rating for transit calls when CLEC provides the transit service shall be the same between the Parties as the rating for calls transited by* ~~***SBC TEXAS***~~ *AT&T TEXAS to or from any similarly situated third party carrier, as set forth in Section 7.2 above.*

[87] *HARRY NEWTON, NEWTON'S TELECOM DICTIONARY, 25TH EDITION (2009).*

Finally, the Arbitrators note that that UTEX has proposed language relating to transit services provided by either party for cellular traffic in §§ 8.0-8.2. The Arbitrators conclude that in order to maintain contractual completeness and to avoid compensation disputes, it is appropriate for the section on transit traffic compensation to include provisions on transit services for cellular traffic. The Arbitrators adopt UTEX's proposed language in §§ 8.0-8.2 labeled Compensation for Terminating Cellular Traffic, with modifications. Section 8.0 should be titled "Compensation for Transit Services for Cellular Traffic." The Arbitrators note that UTEX's proposed language in §§ 8.0-8.1 is substantially similar to the language approved by the Commission in Docket No. 28821 for §14.0 and §14.2 in Attachment 12: Compensation in the CLEC Coalition ICA. In § 8.1, the cross reference relating to the transit rates and indemnification of the transiting party should be corrected to reflect the appropriate sections. With respect to § 8.2, the Arbitrators note that UTEX's proposed language differs from the CLEC Coalition ICA in one respect – UTEX's proposed language requires that the originating party pay the compensation for the traffic to the transiting party while the CLEC Coalition ICA requires the transiting party to pay compensation for the traffic to the terminating party. As discussed above, the Arbitrators find that the transit carrier is not obligated to pay intercarrier compensation for the traffic exchanged between the originating and terminating carriers, and instead the terminating carrier should establish separate compensation and billing arrangements with the originating carrier. Therefore, the Arbitrators modify UTEX's proposed language in § 8.2 as follows so that the transiting party passes appropriate originating information to enable the terminating carrier to seek compensation for the traffic pursuant to relevant sections adopted herein by the Arbitrators:

> *When traffic is originated by either Party to a CMRS Provider, and the traffic cannot be specifically identified as wireless traffic for purposes of compensation between AT&T TEXAS and CLEC, the traffic will be rated either as Local or Access and the appropriate transit ~~compensation~~ rates shall be paid by the originating Party to the transiting Party. The delivery of appropriate originating information by the transiting Party and the compensation for the traffic shall be subject to §§ 7.3-7.8.*

CONCLUSION

The purpose of these "early filed" reply comments was to provide an overview of the Texas PUC's recent resolution of many of the same issues noticed for comment and discussed in the April 6 workshop. FeatureGroup IP has attempted to minimize editorial comment on the Texas PUC's result. We will reserve substantive critiques for later phases of this proceeding.

. Respectfully Submitted,

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April 11, 2010